

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
Criminal Application No.7508 of 2005
In
Criminal Appeal No.1059 of 2005

Noor Mohammed Abdul Rehman Khokar	Applicant
Vs.	
The State of Maharashtra	Respondent

Mr.V.T.Walwalkar with Mr.S.R.Bhalekar for applicant.
Mr.V.B.Konde-Deshmukh, APP for State.

CORAM: B.H.MARLAPALLE & SMT.R.S.DALVI,JJ.
February 20, 2006.

P.C.

. This is an application for bail by the original accused no.2, during the pendency of Criminal Appeal No.1059 of 2005. The learned Addl. Sessions Judge was pleased to convict and sentence all the five accused for the offences punishable under Section 302 read with Section 34 and in the alternative under Section 302 read with Section 120-B of IPC. In addition the accused nos.1 and 2 have also been held guilty and convicted for offence under Section 364 of IPC. It appears that other four accused have also filed separate appeals which are pending i.e. Criminal Appeal Nos.425, 488, 650 and 779 of 2005.

. While advancing his arguments in support of this application Mr.Walawalkar, the learned counsel

submitted that the accused was on bail during the trial and he came to be taken into custody on 18/1/2005 after he was found to be guilty of the offences and was sentenced. He is in custody from 18/1/2005 and thus he is in custody for the last about more than 13 months. While placing reliance on the decisions in the case of *Kashmira Singh v. State of Punjab* [AIR 1977 SC 2147] and *Babu Singh v. State of U.P.* [AIR 1978 SC 527] it was contended by Mr. Walawalkar that being released on bail during the pendency of an appeal is a matter of rule and there could be only an exception in the case of offences like robbery/dacoity with murder. In the case of murder, the convict ought to be released on bail as a matter of rule notwithstanding it being a heinous or dastardly crime. It was further pointed out that the accused being on bail during the trial, as a matter of right under Article 21 of the Constitution he was required to be released on bail when this Court has admitted his appeal against the order of conviction and sentence. The learned counsel further pointed out that rejection of bail of any other accused pending an appeal before this Court will not come in the way of the present applicant for being released on bail and, therefore, the applicant ought to be

released on bail on the terms as were set out for his

bail during the trial of the sessions case.

. As per the prosecution case on 7-4-1999

deceased Ahmedulla Inayatulla had left his house early in the morning who did not return home but contacted on phone at 7 p.m. and 11 p.m. stating that he was at Panvel and was not likely to return that night. A missing report came to be lodged at the Oshiwara Police Station but a written complaint was lodged on 10/4/1999. A trunk was found left unattended/abandoned in a railway compartment of Mahanagari Express at Varanasi cantonment. Upper part of a man's dead body severed from waist onwards was found in the said trunk and it was detected to be of a Muslim male in the age group of 60 to 70 years. Another trunk was found on the same day in the railway compartment of Inter City Express near Mau Railway Station and the trunk contained the lower half portion of a Muslim male body. Both the parts were subjected to autopsy and accused nos.1 and 2 were taken into custody on 13-4-1999. On filing of the charge-sheet the prosecution examined in all 54 witnesses, PW 54 being the Investigating Officer. The trial Court noted that the deceased was known to

the accused no.1 inasmuch as the mother of the accused no.1 was the tenant of the deceased in respect of residential premises. The testimony of PW 2 - Rizvi Shahenshah Mehdi, PW 7 - Noorunisa Begum Mohd. Ahmedullah, PW 6 - Mohammed Nasurulla Ahmedulla, PW 31 - Taskil Vakil Ahmed Shaikh, PW 8 - Smt.Afsar Shehanshah Rizvi and the Medical Officer who conducted the autopsy has been considered by the trial Court in support of the findings that the deceased was last seen in the company of the accused nos.1 and 2. The trial Court has stated that it analysed the evidence of PWs 1 to 30 and PWs 32 to 53 and there was nothing from the defence to discard the said testimony regarding the culpability of the accused, except the testimony of the egg-seller PW 31 who turned hostile. The trial Court recorded a finding that the accused nos.1 and 2 had taken the deceased against his will in a rickshaw and brought him to Dharavi T-Junction from where the premises belonging to accused no.5 were nearabout and the deceased was killed in the said premises, cut into two pieces and thereafter stacked into two different trunks which were transported by accused nos.3, 4 and 5 by the railways.

. It is well settled position in law that the powers of granting bail under Section 439 of Cr.P.C. during the pendency of the trial cannot be equated with the powers of releasing the convict on bail during the pendency of appeal under Section 389 of Cr.P.C. Unless there is a prima facie conclusion in support of suspending the order of sentence, the convict cannot be released on bail under Section 389 of Cr.P.C.

. In the instant case, having considered the reasoning set out by the learned Addl. Sessions Judge in support of his findings regarding the culpability of the applicant along with accused no.1 and the evidence of the prime witnesses as recorded before the trial Court, we are satisfied that there is no case made out to suspend the order of sentence and release the applicant-accused no.2 on bail during the pendency of Criminal Appeal No.1059 of 2005.

. The application is, therefore, rejected.

(SMT.R.S.DALVI,J.)

(B.H.MARLAPALLE,J.)